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IN THE

Supreme Court of the United States

October Term, 1959

No. 499

E. F. BARNES, J. C. CARSON, Jr. JELKS and J. ROBERTSON,

Petitioners,

—v.—

THE CITY OF GADSDEN, ALABAMA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE CITY OF GADSDEN, ALABAMA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

No opinion was written by the majority of the court below affirming the judgment for respondents by the United States District Court for the Northern District of Alabama. However, the minority opinion of Judge Rives, concurring in part and dissenting in part, is reported, *Barnes* v. *City of Gadsden, Alabama*, 268 F. 2d 593 (1959), and reproduced in Appendix A. The opinion of the trial court also is reported, *Barnes* v. *City of Gadsden*, 174 F. Supp. 64 (1958), and appears in the printed record (R. 275-284).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1). The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on June 30, 1959. Petition for rehearing was denied on September 4, 1959, Judge Rives dissenting (Appendix A, pp. 40-41).

Questions Presented

1. Whether the present urban redevelopment plans of the City of Gadsden, Alabama, actually contemplate the effectuation of residential racial segregation and should, therefore, be enjoined?

2. Whether the private redevelopers, in disposing of the housing accommodations constructed by them in accordance with said plan, or any constitutionally valid urban redevelopment plan, may discriminate between purchasers on the basis of race or color.

Constitutional and Statutory Provisions Involved

This case involves the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and the provisions of Title 42, United States Code, §1982 which provide as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" [Amendment 14, §1].
>
> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property" [Title 42, U. S. C. §1982].

This case also involves some of the provisions of Title I of the Housing Act of 1949, as amended,[1] since the urban redevelopment plans under attack are plans which were prepared and approved and which will be financed and executed pursuant to said provisions. However, only those provisions deemed to have direct bearing upon this case are set forth in Appendix B.

Statement of the Case

Invoking the jurisdiction of the trial court pursuant to Title 28, United States Code, §1343(3) and relying upon provisions of Title 42, United States Code, §§1981 and 1982, petitioners filed suit in the United States District Court for the Northern District of Alabama, Middle Division, on March 10, 1958 on behalf of themselves and approximately fifty other Negro property owners, similarly situated, challenging the validity of the urban redevelopment plans adopted by the City of Gadsden, Alabama on the ground that these plans are expressly designed to effectuate residential racial segregation.[2] Declaratory and injunctive relief was sought.

The plans in controversy were approved for federal financial assistance by the Urban Renewal Administration in accordance with certain provisions of Title I of the Housing Act of 1949, as amended, and a contract for such finan-

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[1] Title 42, United States Code, §§1441, 1450-1462, as amended.

[2] Respondents are authorized by statute to undertake this urban redevelopment. Alabama Code, 1940, Title 25, §§3, 12, 15.

cial aid was entered into between the national government and the local public agency on August 28, 1957.

After a hearing on petitioners' motion for preliminary injunction, which was denied, followed by a hearing on respondents' motion to dismiss and, by stipulation, on the merits, the District Court entered judgment for respondents pursuant to its findings of fact and conclusions of law (R. 275-285). The District Court found as a fact that the plans were not intended to and would not have the effect of segregating the races and concluded as a matter of law that the private redevelopers, in disposing of the housing constructed by them in the redeveloped areas in accordance with the city's plan, would not be subject to constitutional proscriptions on state action.

Upon appeal to the court below, the District Court judgment was affirmed by two members of the court without opinion. Judge Rives, the third member of the court, in a lengthy opinion, affirmed in part and dissented in part.

Judge Rives found as a fact that the plans contemplate *actual* segregation but affirmed the denial of an injunction, which would have prevented execution of the particular plans in controversy, on the ground that "the serious injury which the public may suffer from the stoppage of the slum clearance projects, and the desire to afford every opportunity for the voluntary cooperation of the members of all races for their common welfare and betterment are potent factors tending to cause the Court to exercise its discretion to deny an injunction at the present stage of development of the plans" (Appendix A, p. 20).

Judge Rives dissented on the ground that the conclusion of law pronounced by the District Court with relation to the acts of the private redevelopers was clearly erroneous in the light of several applicable decisions of this Court.

Relying on a decision of the Court of Appeals of the State of New York, *Dorsey* v. *Stuyvesant Town*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, cert. den., 339 U. S. 981, and a federal district court, *Johnson* v. *Levitt & Sons* (E. D. Pa. 1955), 131 F. Supp. 114, the trial court had held that action of private redevelopers in refusing to sell to petitioners and members of their class, solely because of race or color, "would not be actions under color, authority, or constraint of state law, nor would they be the performances of functions of a governmental character" (R. 283).

Citing recent applicable decisions of this Court, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230 (1957); *Terry* v. *Adams*, 345 U. S. 461 (1953); *Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952), Judge Rives held that the private redevelopers in this case are not free to discriminate since, in his opinion, the plans in controversy, which are clearly "governmentally conceived, governmentally aided and governmentally regulated," shall not have been completed until the property passes out of the control of these redevelopers (Appendix A, p. 25). Accordingly, Judge Rives held petitioners are now entitled to a judgment declaring their rights as stated in his opinion (Appendix A, p. 26).

Judge Rives' conclusions that the plans contemplate *actual* segregation and are "governmentally conceived, governmentally aided and governmentally regulated" were based upon facts in the record which were either "undisputed or conclusively established" but which were not noted in the District Court's findings of fact. Therefore, Judge Rives set forth these facts in an appendix to his opinion (Appendix A, p. 27). Judge Rives states that he followed this unusual procedure because of "the importance of this litigation to the public, as well as to the litigants."

At this point petitioners respectfully direct the attention of this Court to the appendix to Judge Rives' opinion. However, because the facts there set forth were without appropriate page references to the printed record and exhibits before the Court of Appeals, and since petitioners have furnished this Court with nine copies of the printed record, petitioners have inserted in Judge Rives' appendix appropriate page references and references to petitioners' exhibits. Attention is called to Exhibit A, entitled "Gadsden Redevelopment," and Exhibit B, Local Public Agency Letter No. 16, dated Feb. 2, 1953. Attention is also called to Plaintiffs' Exhibit 1, consisting of 1) a copy of each redevelopment plan, 2) Parts I & II of the Loan and Grant Contracts between the Greater Gadsden Housing Authority and the United States of America, and 3) agreements between the City of Gadsden and the Greater Gadsden Housing Authority, dated July 25, 1957. Finally, the court's attention is called to Plaintiffs' Exhibit 1 attached to deposition of Mr. Wedge, Regional Director of the Urban Renewal Administration, and entitled "The Gadsden Plan." This exhibit is a master plan for the city as a whole, adopted by the City Planning Commission of Gadsden, Alabama, February 19, 1949. This exhibit should not be confused with Plaintiffs' Exhibit A which is, admittedly, a correct description of the immediate plans under attack (R. 172-173).

In addition to the facts set forth in Judge Rives' appendix, petitioners call this Court's attention to the fact that after the final decision on the merits in the trial court, the Judge of that court reopened the case for the limited purpose of receiving in evidence affidavits made by petitioners and twenty-one other Negro owner-occupants of the Birmingham Street Area, similarly situated, attesting to their financial ability to purchase homes in the redeveloped Birmingham Street Area and their firm desire to do so, if

permitted. These affidavits as well as each exhibit have been sent up to this Court in their original form.

Reasons Relied on for Allowance of Writ

I. The Public Importance of This Case

This case involves implementation of Title I of the Housing Act of 1949, the federal government's program of assistance to local communities in order that our perennial nationwide problem of recurring slum and blighted residential areas may be met, America's cities rebuilt, and we may sooner realize our national housing policy's objective of "a decent home and a suitable living environment for every American family."[3] The special importance of this case to the public, as well as to these petitioners, stems from the fact that the record in this case conclusively establishes that this newest federal housing program is being implemented by public officials, both state and federal, in complete disregard of constitutional restrictions on public action. After carefully considering the entire record in this case, Judge Rives stated, "I cannot escape the conclusion that *actual* segregation is contemplated" (Appendix A, p. 16). If, as Judge Rives points out, the residential segregation to be effected here were voluntary or the result of wholly private activity, no constitutional objections could be interposed. But the segregation here will clearly result from non-acquiescence on the part of the Negro community which voiced its objections at a public hearing (R. 40, 133) and from a plan which is "governmentally conceived, governmentally financed, and governmentally regulated."[4]

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[3] Declaration of National Housing Policy, Title 42, United States Code, §1441.

[4] *Dorsey* v. *Stuyvesant Town*, *supra*, dissenting opinion of Judge Fuld, 14 A. L. R. 2d, 150.

Prior decisions of this Court have unequivocally voided legislative and judicial enforcement of residential racial segregation. *Buchanan* v. *Warley*, 245 U.S. 60; *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Barrows* v. *Jackson*, 346 U. S. 249. However, in this case, the executive arm of government, through agencies concerned with expanding the availability of decent housing and the rebuilding of our cities, is found to be enforcing residential racial segregation through the adoption and implementation of plans for urban redevelopment. The record in this case discloses that the areas to be redeveloped are presently racially integrated. In the Birmingham Street area "... occupancy of dwelling units ... is evenly divided (323 white and 331 Negro) ..." (Exh. A, p. 24). This area will be cleared of Negroes (Exh. A, p. 24). In the North Fifth Street Area Negroes occupy about 40% of the dwelling units. However, according to respondents, "... the fact that so little of the area is built up leaves its future racial status still in doubt" (Exh. A, p. 24). Respondents, therefore, conclude that with respect to this latter area, "North of Tuscaloosa Avenue only specific planning, such as is advocated in this redevelopment proposal, can forecast the future racial occupancy" (Exh. A, p. 24). Thus, this case reveals that under the guise of urban redevelopment and urban renewal the executive arm of government becomes the primary agent in the *initiation* of segregated living.

The record in this case also confirms the shocking conclusion of a recent major study on residential racial segregation in the United States: "The policies and actions of government agencies and public officials must be counted among the principal influences sustaining racial segregation in housing."[5]

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[5] "Where Shall We Live?", Report of the Commission on Race and Housing, University of California Press (1958), p. 29.

Not only does this case involve nullification of prior decisions of this Court in the area of residential racial segregation but also the nullification of this Court's decisions in the *School Segregation Cases*. Judge Rives emphasizes in the appendix to his opinion the manner in which the urban redevelopment program is being used in this case to nullify this Court's decisions in the *School Segregation Cases*. Judge Rives points out that,

> "The formal redevelopment plan of the North Fifth Street Area approved by the City provides that:
>
> 'The North Fifth Street Area will, after redevelopment, provide 141 units with FHA Committments [sic] (tentatively approved) open to non-white occupancy . . . ' (Appendix A, p. 28).
>
> . . . .
>
> 'c. Recreational and Community Facilities—The setting aside of land for the use of the City for the erection of a needed Civic Center with adjacent playfield and picnic area is in keeping with the adjacent facilities already erected (Negro Swimming Pool three blocks away). Also the City Board of Education took into consideration the Redevelopment Plan when they erected an elementary school which is located approximately eight blocks away from the Project Area.'" (Appendix A, pp. 28-29).

Judge Rives then points out that "After reading the foregoing paragraph, Mr. Mills testified: 'That is in fact a colored school'" (Appendix A, p. 29).

It is, therefore, clear that if the decision of the majority below is permitted to remain unreversed by this Court, the policies and actions of government agencies and public officials must also be counted among the principal influences sustaining racial segregation in education.

Consequently, the question whether the present urban redevelopment plans of the City of Gadsden actually contemplate the effectuation of residential racial segregation, and should therefore be enjoined, and the question whether private redevelopers, in disposing of the housing accommodations constructed by them in accordance with the present plan, or any constitutionally valid urban redevelopment plan, may discriminate between purchasers on the basis of race or color are questions of the greatest public importance which have not been but which must now be determined by this Court.

II. The Court Below Has Decided This Case in Conflict With Applicable Decisions of This Court and Applicable Principles Established by Decisions of This Court

In the court below petitioners assigned as error, among others, the finding of the District Court that there was no evidence to support petitioners' contention that the urban redevelopment plans contemplate racial segregation. In connection with this assignment of error, petitioners ask this Court to consider Judge Rives' appendix to his opinion where he sets forth the facts which led him to hold that the record in this case contains controlling additional facts, themselves either undisputed or conclusively established, which were not noted in the District Court's findings of fact but which, when carefully considered, lead to the inescapable conclusion that *actual* segregation is contemplated. If Judge Rives is correct that the record discloses that *actual* segregation is contemplated, the judgment of affirmance by the majority below conflicts with long settled applicable principles established by decisions of this Court. *Buchanan* v. *Warley, supra; Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704; *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson, supra;* cf. *Brown* v.

Board of Education of Topeka, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1.

Petitioners also assigned as error the District Court's ruling that if private interests restrict sales in the Birmingham Street Area to white people and sales in the North Fifth Street Area to colored people, such sales would not be actions under color, or authority, or constraint of state law, nor would they be performances of functions of a governmental character. Affirmance of this holding by the majority is also in conflict with apposite principles established by decisions of this Court construing and applying the Fourteenth Amendment's prohibitions and defining the duty imposed upon those acting pursuant to authority conferred by government. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230; *Barrows* v. *Jackson*, *supra*; *Terry* v. *Adams*, 345 U. S. 461; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768; *Shelley* v. *Kraemer*, *supra*; *Smith* v. *Allwright*, 327 U. S. 649; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; see *Cooper* v. *Aaron*, *supra*, at 19; see, *Civil Rights Cases*, 109 U. S. 3, 17.

Judge Rives, in his carefully considered dissenting opinion, holds that, under the facts of this case, the private redevelopers may not discriminate against purchasers of homes on the basis of race and color and in support of his holding cites several of the next preceding decisions of this Court.

Judge Rives' holding was based primarily upon the fact that in this case the private redeveloper will be an essential participant in the performance of a governmental function. Judge Rives said, "In my opinion, the plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of the property within

either of the Areas the redeveloper may not discriminate between purchasers on the basis of race and color" (Appendix A, p. 25).

Judge Rives also based his decision on the degree of and necessity for the governmental aid involved which will inure to the private redevelopers and ultimately the purchasers from these redevelopers. Judge Rives found that governmental financial aid is *required* if the redevelopers are to construct the kind of housing described in the redevelopment plan. The city is required by the federal statute to certify that such public assistance is necessary. The entire cost of acquiring the land in the redeveloped areas, of clearing these areas, and providing necessary facilities such as streets, water supply and sewers, less such "fair value" as may be required to be paid by the redevelopers, is to be financed by state and federal funds. Two thirds of this cost will be borne by the federal government and one third by the City of Gadsden (Part F, Loan and Grant Contract, Plaintiffs' Exhibit 1).

Finally, Judge Rives based his decision on the extent of governmental control which is to be exercised over the activities of these redevelopers. He found that the private redevelopers will be obligated by the local public agency to devote the redeveloped land to the uses specified in the urban redevelopment plans and to begin and complete the building of the improvements in this case homes, within a reasonable time (Part II, Section 106(11), Loan and Grant Contract, Plaintiffs' Exhibit 1). Such obligation is also required by the federal statute.[*]

In addition to obligating the private redevelopers to carry into effect the redevelopment plans, the private re-

[*] Title 42, United States Code, §1455(a) (See Appendix B).

[†] *Ibid.*

developers will be subject to numerous other governmental controls, as evidenced by the formal redevelopment plans. (See section headed "Controls on Redevelopment" in each plan. Plaintiffs' Exhibit 1.)

However, it must be carefully noted that the only obligation on respondents and private redevelopers with respect to racial restrictions is to refrain from effecting or executing any instrument whereby the sale, lease or occupancy of any land in the redeveloped areas shall be restricted on the basis of race, creed or color. Respondents will place great stress on this obligation and will claim that it will operate to prevent discrimination in disposing of land in project areas. However, even the District Court did not find that this obligation would so operate. The District Court held that the sales policies of private redevelopers, despite this obligation, would not be subject to Fourteenth Amendment prohibitions. The fact is petitioners will not be protected. Even the federal agency does not construe the requirement as affording any such protection (R. 221-223). Plaintiffs' Exhibit B plainly demonstrates that the federal agency's policies expressly provide for the approval of redeveloped areas which will not be available to Negroes and other minority group families.

Moreover, as this Court said in *N.A.A.C.P.* v. *Alabama*, *supra*, at 463:

> It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioners' activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

Similarly, here, the crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power, represented by public planning, public condemnation, public expenditures and public clearance and redevelopment of land that private discriminatory action against petitioners will take hold.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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Attorney for Petitioners

Certificate of Service

This is to certify that on the 23 day of October, 1959, I served a copy of the foregoing petition for writ of certiorari upon the Hon. William B. Dortch, attorney for respondent City of Gadsden, Alabama, and upon the Hon. John A. Lusk, Jr., attorney for respondents Greater Gadsden Housing Authority and Walter B. Mills, by personally serving a copy upon each of them at their respective offices in the City of Gadsden, Alabama.

ARTHUR BURNS
Attorney for Petitioners

APPENDIX A

Opinion of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17534

E. F. BARNES, J. C. CARSON, J. JELKS and J. ROBERTSON,
Appellants,

—v.—

THE CITY OF GADSDEN, ALABAMA, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

(June 30, 1959.)

Before RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a final judgment for defendants. The plaintiffs seek a declaration and injunction against the execution and putting into effect of certain urban redevelopment plans of the City of Gadsden, Alabama, attacked upon the ground that they foster enforced racial segregation. The district court entered judgment in favor of defendants pursuant to findings of fact and conclusions of law, now reported in ——F.Supp. ——, with which all of the members of this Court were

tentatively in agreement in our first conference following the argument and submission of this appeal. After further study and more mature deliberation, Judges Cameron and Jones adhere to that view while the writer concurs in part and dissents in part for reasons separately stated. The judgment is therefore

AFFIRMED.

RIVES, Circuit Judge, Concurring in part and dissenting in part:

A careful study of the record and exhibits has convinced me that there are controlling additional facts, themselves either undisputed or conclusively established, which were not noted in the district court's findings of fact. Recognizing the importance of this litigation to the public, as well as to the litigants, I have set forth those facts at considerable length in an appendix to this opinion. Excluding those items of doubtful value or of questionable admissibility, but otherwise carefully considering the entire record, I cannot escape the conclusion that *actual* segregation is contemplated. So long as that is voluntary, rather than governmentally enforced, there can be no constitutional objection. As we said in *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73, 78:

> "Mr. Stillwell's testimony has been noted (footnote 7, *supra*) to the effect that in his opinion actual segregation is essential to the success of a program of public housing in Savannah. If the people involved think that such is the case and if Negroes and whites desire to maintain voluntary segregation for their common good, there is certainly no law to prevent such cooperation. Neither the Fifth nor the Fourteenth Amendment operates positively to command integra-

tion of the races but only negatively to forbid governmentally enforced segregation."

"[11] Cf. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690, 692."

That governmentally enforced segregation in housing is unconstitutional has now been settled beyond controversy.[1] The cases just cited in footnote 1 make clear that a State agency has no constitutional power to oust persons of one race from their homes and thereafter forcibly to restrict the land to the exclusive occupancy of persons of another race. Ultimately then, the issue on its merits must turn upon whether the contemplated actual segregation is to be voluntary or governmentally enforced. At the present stage the plaintiffs and the defendants face real, though different, dilemmas in reaching that issue. The plaintiffs feel that they cannot wait longer. As their attorney stated to the district court:

"Mr. Burns: That is the very reason why we have to do this now. If we wait until the private developers get it into their hands, it's too late.

"In that Levitown case, where the Court said that the Court would not require the private developer to sell; allowed him to discriminate, where it was without

[1] Buchanan v. Warley, 1917, 245 U.S. 60; Benjamin v. Joseph W. Tyler, 1927, 273 U.S. 668; City of Richmond v. Deans, 1930, 281 U.S. 704; Shelley v. Kraemer, 1948, 334 U.S. 1; Barrows v. Jackson, 1953, 346 U.S. 249; City of Birmingham v. Monk, 5th Cir. 1950, 185 F.2d 859; Detroit Housing Commission v. Lewis, 6th Cir. 1955, 226 F.2d 180; Tate v. City of Eufaula, Alabama, M.D. Ala. 1958, 165 F.Supp. 303; Jones v. City of Hamtramck, E.D. Mich. 1954, 121 F.Supp. 123; Yann v. Toledo Metropolitan Housing Authority, N.D. Ohio 1953, 113 F.Supp. 210; Banks v. Housing Authority, D.C. App. Calif. 1953, 260 P.2d 668; Taylor v. Leonard, 30 N.J. Super. 116, 1954, 103 A.2d 632.

dispute that he was discriminating and the Court let him do it."

In its conclusion of law the district court recognized, if it did not resolve, the plaintiffs' dilemma:

"The Court concludes from an analysis of plaintiffs' complaint, evidence and arguments that their claim for relief is grounded primarily on the apprehension that when the two areas are cleared and rehabilitated and sold to private interests under legitimate restrictions as to use that plaintiffs and members of their class will not be able to purchase property in the Birmingham Street Area because of their race or color. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. 2d 541, 14 A.L.R.2d 133, cert. denied 337 U.S. 981, and that if they purchase homes in the North Fifth Street Area they will be racially segregated in that area, and, therefore, they should be delivered from the apprehension of this possible dilemma by injunctive relief, preventing the carrying out of the plans which, they insist, constitute a scheme and design for initiating, enforcing, extending and perpetuating racial segregation in residential areas of Gadsden in violation of their constitutional rights. Otherwise, they see no escape from their anticipated predicament once the properties are sold to private interests; and they are fearful in that event that their last state will become worse than their first.

. . . . . .

"If the Court assumes that private interests will restrict sales in the Birmingham Street Area to white people and the North Fifth Street Area to colored people, such sales would not be actions under color, authority, or constraint of state law, nor would they

be the performances of functions of a governmental character. Dorsey v. Stuyvesant Town Corp., supra. Johnson v. Levitt & Sons, Inc., E.D. Pa., 131 F.Supp. 114."

The defendants, on their part, stoutly deny that any forced segregation is contemplated. Their brief states:

"In this case no one is compelled to occupy the new houses to be constructed, and no one is prohibited from purchasing such houses; anyone buying any of the property will have to buy it with full knowledge that there can be no discrimination in the future.

. . . . . .

"The court should assume that the defendants, their agents and successors in office, after receiving the federal assistance in this public project, will, upon completion of this project, or in carrying it out, recognize the law to the effect there can be no governmentally enforced segregation solely because of race or color. Tate v. City of Eufaula, 165 Fed.Supp. 303."

The defendants point out that the plaintiffs may not, hen the time comes, want to move back into either of e Areas:

". . . it boils down to the question of whether a complaint based on plaintiffs' alleged fears that they may not be able to repurchase land in the redeveloped area states a cause of action upon which relief can be granted. It is obvious that such redevelopment cannot be accomplished in a short period of time. It is equally obvious that not only plaintiffs but all occupants of the North Fifth Street area and the Birmingham Street area must be moved and relocated pending such clearance. If is by no means clear that plaintiffs

> or any of the occupants of these areas will even want to move back into such areas after redevelopment. Yet these plaintiffs are insisting that the entire slum clearance project be stopped on such a complaint."

I agree that the serious injury which the public may suffer from the stoppage of the slum clearance projects, and the desire to afford every opportunity for the voluntary cooperation of the members of all races for their common welfare and betterment are potent factors tending to cause the Court to exercise its discretion to deny an injunction at the present stage of development of the plans. As said by Judge Sibley, speaking for this Court in *Kelliher v. Stone & Webster*, 5th Cir. 1935, 75 F.2d 331, 333, 334:

> ". . . and when a public improvement is sought to be stopped, the inconvenience to the public, as weighed against a slight or remediable wrong to the plaintiff, may determine the court of equity against this discretionary remedy."

The injury which the plaintiffs anticipate, namely, that they may be forced to dispose of their homes for an unconstitutional purpose, cannot be called slight. Rather, the questions are whether the plaintiffs will suffer a legal wrong and whether, at the present stage, their plight is irremediable. If irreparable injury to the plaintiffs will ensue, and if such injury cannot be otherwise prevented, then a suit for injunction restraining the carrying out of the plans is appropriate to present the question of a proposed unlawful exercise of the power of eminent domain for the purpose of subjecting the property taken to a racially discriminatory and unconstitutional use.

City of Los Angeles v. Los Angeles Gas & Electric Corporation, 1919, 251 U.S. 32; Iowa Electric Light & Power Co. v. City of

The "Controls on Redevelopment," including the requirement of an anti-racial covenant, go a long way to protect the plaintiffs from governmentally enforced segregation. They do not, however, afford adequate protection if the redeveloper is free to restrict sales in the Birmingham Street Area to white people and in the North Fifth Street Area to Negroes. Enforced segregation might well be the practical result, whether or not so intended by the defendants. The plaintiffs might derive some small comfort from hearing a court tell them that their segregation was privately enforced rather than governmentally enforced. They might still feel that they stood equal before the law.

While the district court entered formal judgment for the defendants, it did not in fact decline to make *any* declaration of the rights of the parties, but in those parts of its conclusions of law which I have quoted, ante, p. 3, as construed in connection with the cases cited, it held that the redeveloper is a mere private individual and as such free to discriminate in sales to persons of different races. For reasons presently to be stated, I do not agree with that conclusion, but, by the same token, I do agree that injunction at the present stage of development of the plans should be denied.

The district court relied upon two cases in considering that sales by the redeveloper would not constitute state action within the meaning of the Fourteenth Amendment. *Dorsey v. Stuyvesant Town Corporation*, 1949, 299 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133, and *Johnson v. Levitt & Sons*, E.D. Pa. 1955, 131 F.Supp. 114. In the

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Lyons, Neb., D.C. Neb. 1958, 166 F.Supp. 676, 680; Quinn v. Dougherty, App.D.C. 1929, 30 F.2d 749; Reichelderfer v. Quinn, App.D.C. 1931, 53 F.2d 1079, reversed on merits, 1932, 287 U.S. 314; 30 C.J.S., Eminent Domain, Secs. 403, 407; 18 Am.Jur., Eminent Domain, Sec. 386.

Johnson case the district court held that F.H.A. and V.A., as federal agencies guaranteeing mortgages on housing projects, had no duty to prevent discrimination in sales of houses, and injunction did not lie to restrain agencies from insuring mortgages so long as the project proprietor discriminated against purchasers because of race and color.

In *Dorsey* v. *Stuyvesant Town Corporation*, *supra*, the New York Court of Appeals held that a corporation organized under the New York Redevelopment Companies Law to provide low-cost housing is not an agency of the state and hence is not prohibited by the equal protection clauses of the State and Federal Constitutions from discriminating against prospective tenants because of race, color, or religion. The case is unusually well considered both by Judge Bromley, speaking for the majority of four, and by Judge Fuld, speaking for the three dissenting judges. The majority arrives at the conclusion that:

> ". . . The aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question." 14 A.L.R. 2d 146.

The extent of the aid furnished by the State and Federal Governments to the redeveloper and of the control to which the redeveloper is subject readily distinguishes the present case from either of the cases upon which the district court relied. In *Johnson* v. *Levitt & Sons*, *supra*, the federal agencies simply guaranteed mortgages on housing projects. In *Dorsey* v. *Stuyvesant Town Corporation*, *supra*, the City of New York agreed to condemn the land

[3] Compare Ming v. Horgan, Super. Ct. Sacramento County, Calif., 1958, reported in 3 Race Relations Law Reporter 693.

necessary for the project and to grant a tax exemption, but the full cost of construction and land acquisition was to be borne by the corporation. In the present case, the entire cost of land acquisition, and of the land itself, less such "use value" as may be required to be paid by the redeveloper, is to be borne by government funds, approximately two-thirds by the United States and one-third by the City of Gadsden. Of even more importance, the redeveloper is an essential participant in the overall plans for redevelopment here involved. The federal statute made it necessary for the Authority to require the redeveloper to carry the plan into execution.[*]

The formal plans approved by the City of Gadsden contained detailed and specific "Controls on Redevelopment" requiring "The redeveloper to begin and complete the development of Project Land acquired by it for the use required by the Redevelopment Plan . . ." If *Dorsey v. Stuyvesant Town Corporation, supra*, had presented a like extent of governmental aid and of state control of

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[*] "§1455. *Requirements for loan or capital-grant contracts*

"Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

"Obligations of purchasers, lessees, and assignees of property

"(b) When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this title: *Provided*, That clause (ii) of this subsection shall not apply to mortgagees and others who acquire an interest in such property as the result of the enforcement of any lien or claim thereon." 42 U.S.C.A. §1455 (b).

the corporation. I believe that the majority must have agreed with the dissenters' view that:

> ". . . Unmistakable are the signs that this undertaking was a governmentally conceived, governmentally aided and governmentally regulated project in urban redevelopment." 44 A.L.R. 2d 150.

I would not repeat a reference to the authorities so well discussed in *Dorsey v. Stuyvesant Town Corporation, supra*, but would refer briefly to a few later decisions. Among these is our own case of *Derrington v. Plummer*, 5th Cir. 1956, 240 F.2d 922, in which we held that, where a county leases a cafeteria in a newly constructed courthouse to a private tenant operator, the tenant's exclusion of persons merely because they were Negroes constituted state action in violation of the Fourteenth Amendment.

In *N.A.A.C.P. v. Alabama*, 1958, 357 U.S. 449, 462, 463, the Supreme Court said:

> "We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to

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[3] That holding, it may be noted, was cited with approval by the Supreme Court in Cooper v. Aaron, 1958, 358 U.S. 1, 17.

pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

"It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."

A few other late Supreme Court cases illustrative of the principle that governmental action may include the action of a private person who performs a governmental function are: *Railroad Trainmen* v. *Howard*, 1952, 343 U.S. 768; *Terry* v. *Adams*, 1953, 345 U.S. 461; and *Pennsylvania* v. *Board of Trusts*, 1957, 353 U.S. 230.

In my opinion, the plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of property within either of the Areas the redeveloper may not discriminate between purchasers on the basis of race or color. We should, I think, follow the course so well outlined by Judge Johnson of the Middle District of Alabama in *Tate* v. *City of Eutaula, Alabama*, M.D.Ala. 1958, 165 F.Supp. 303, 306, 307:

". . . this Court must now assume that these defendants, their agents and successors in office, after receiving the federal assistance in this public project, will, upon a completion of this project (or any phase of it), recognize the law that is now so clear; this law

being to the effect that there can be no governmentally enforced segregation solely because of race or color . . .

"If these defendants, their agents or successors, as public officers and with federal financial assistance complete this project or any phase of it, they do so with the certain knowledge that there must be a full and good faith compliance with this existing law."

I agree that the judgment should be affirmed in so far as it denies an injunction, but, to the extent that it seems to me actually but erroneously to declare the rights of the parties, I think that the judgment should be reversed and judgment here rendered declaring such rights as stated in this opinion. I therefore concur in part and dissent in part.

Appendix*

Material Facts Not Fully Set Forth in the District Court's Findings

The City of Gadsden is an Alabama municipal corporation,[1] and the Greater Gadsden Housing Authority is a public body corporate organized under the laws of the State of Alabama.[2]

Each of the four Negro plaintiffs owns a house in which he resides located in the Birmingham Street Area (R. 276). Each member of the represented class of about fifty other Negro citizens owns a house in one of the areas planned for redevelopment (R. 276). The North Fifth Street Area contains a considerable amount of vacant land and is planned to be redeveloped ahead of the Birmingham Street Area, so as to provide living space in the form of 128 small building lots for some of the families displaced by the later demolition of the Birmingham Street Area (Plaintiffs' Exh. A, pp. 10, 12). The latter area is then to be redeveloped to provide 121 large building lots for single-family homes (Plaintiffs' Exh. A, p. 10). The Authority admits in its answer that it plans to purchase or acquire by eminent

* Petitioners have inserted in this appendix appropriate references to the pages of the printed record, 9 copies of which have been furnished this Court, and appropriate references to Petitioners' exhibits which have been sent up to this Court in their original form.

[1] The laws of Alabama authorize the City to join in the execution of the plans for urban redevelopment. 1940 Code of Alabama, Title 25, Section 3.

[2] The powers of the Authority are detailed in 1940 Code of Alabama, Title 25, Section 12. Section 15 of the same title vests the Authority with the right to acquire property by eminent domain.

domain all of the property in the two Areas planned for redevelopment (R. 95).

The Agreements between the City and the Authority disclose that, in order for the Authority to effectuate the plans,

> " . . . the assistance of both the Federal Government and the City is required; namely of the Federal Government by lending funds needed to defray the gross cost of the Project, and upon completion of the project and repayment of such loan, by contributing two thirds (⅔) of the net cost of the project; and of the City by making certain local grants-in-aid (as specified by Title I of the Housing Act of 1949, as amended) as hereinafter provided, in a total amount equal to at least one-third (⅓) of the net cost of the Project . . . . " (Plaintiffs' Exh. 1, p. 1 of said Agreement.)

The formal redevelopment plan of the North Fifth Street Area approved by the City provides that:

> "The North Fifth Street area will, after redevelopment, provide 141 units, with FHA Committments [sic] (tentatively approved) open to non-white occupancy. 73 single family sales units in the price range of $6,500 to $8,500, 64 duplex units in the rental ranges of $40.00, $45.00 and $50.00 shelter rent per month, will be available (Plaintiffs' Exh. 1, p. 7, of said plan).
>
> "c. Recreational and Community Facilities—The setting aside of land for the use of the City for the erection of a needed Civic Center with adjacent play field and picnic area is in keeping with the adjacent facilities already erected (Negro Swimming Pool three

blocks away). Also the City Board of Education took into consideration the Redevelopment Plan when they erected an elementary school which is located approximately eight blocks away from the Project Area" (Plaintiffs' Exh. 1, p. 11 of said plan).

After reading the foregoing paragraph, Mr. Mills testified: "That is in fact a colored school" (R. 36).

The formal redevelopment plan of the Birmingham Street Area approved by the City also states: "The North Fifth Street area will, after redevelopment, provide 138 units, with FHA Committments [sic] (tentatively approved) open to Negro Occupancy" (Plaintiffs' Exh. 1, p. 6a of said plan).

The document principally relied on by the plaintiffs was made Exhibit A to their complaint, and consisted of an elaborate printed brochure captioned, "Gadsden Redevelopment." Its preparation was paid for by the Federal Government (R. 197-198). It was the only document handed out to the general public at the time of a public hearing required by 42 U.S.C.A. 1455(d) to be held in connection with the redevelopment plans (R. 133). At that hearing Negro citizens voiced their objections to the plans (R. 133).

Mr. Wedge, Regional Director of the Urban Renewal Administration, testified:

"A. That particular brochure was submitted to our agency in connection with the planning and survey materials prepared with the benefit of the preliminary advance of funds.

"Q. All right, sir. I believe you said or did I understand you to say that this brochure here was submitted to your agency by the Greater Gadsden Housing Authority?

"A. It was submitted as a part of the supporting documentation accompanying the applications". (R. 198).

The parts of that document upon which the plaintiff rely are quoted in the margin.[3]

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[3] "SITES SELECTED FOR REDEVELOPMENT

"The Birmingham Street Site

"The Master Plan describes the Birmingham Street Area as '. . . lying in the flat land at the head of Rum Branch, formerly a servants' quarters section that became pocketed by better class residential development. Lack of space for expansion led to "building between" until now these few blocks contain 250 dwellings. The area is occupied by Negroes, but the number is too few to justify provisions of proper recreational, school, and social facilities.'

"The recent survey brought out, more forcefully because it was more detailed, the facts stated in the Master Plan's diagnosis: the poor quality of housing, lack of public and community facilities, and overcrowding. These conditions are in strong contrast to those of the surrounding section which, except for a small commercial center to the north, is characterized by homes of good quality.

"The opportunity to reconstitute the area as a residential district in harmony with its surroundings was the main reason for its selection as the number one redevelopment site (Exh. A, p. 4).

"The North Fifth Street Site

"A relatively small amount of housing—standard or substandard—exists on the North Fifth Street site. This, in fact, is the principal reason for its selection as a companion project to the Birmingham Street one: it will permit redevelopment for a greater number of families than clearance of the site will displace, thus affording home sites for those occupants of the Birmingham Street site who are not eligible for relocation in public housing or who, for reasons of their own, prefer single-family or duplex dwellings.

"A second important reason for selection of this area for redevelopment is the incentive it will provide for further extension of the Negro neighborhood up along the foothills of Shinbone Ridge. While some of the terrain is steep, much of it is gently rolling and well drained; this can be developed as an open residential section, convenient to school and social centers as well as to the central business district and industries of the city (Exh. A, p. 5).

"THE PROJECTED PLANS

"North Fifth Street Area

"In most Southern cities there is a scarcity of vacant land located close to schools and churches and shopping districts and served by city utilities and transportation, land that is suitable and desirable

The plaintiffs rely also on "Local Public Agency Letter No. 16" issued by the Director of the Housing and Home Finance Agency on February 2, 1953, and reading in part as follows:

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for expansion of Negro neighborhoods or creation of new ones. This is true of Gadsden.

"But sometimes careful search will reveal areas that have been overlooked or by-passed or, for some other reason, have not been exploited for this purpose. The North Fifth Street site is such an area.

"Blighted in its south part and spoiled for residential use north of Tuscaloosa Avenue by a sprawling but small industrial enterprise, this site is, nevertheless, one that offers the possibility for a new offshoot from the Tuscaloosa Avenue neighborhood. It is close to schools, churches, lodges, swimming pool, and playgrounds, as well as to the Tuscaloosa Avenue business section. It can easily be served with city utilities.

"Most importantly, it gives, to the north, onto a large open space that can be used for expansion of the small development to be created initially through this program (Exh. A, p. 6).

"USE OF LAND

"North Fifth Street Area

"A feature of the plan is the four-acre site allocated to a community center; here the city will in future construct an auditorium to serve the Negro community. A small playfield to augment existing recreational facilities in the neighborhood will be provided in conjunction with the center (Exh. A, p. 10).

"BIRMINGHAM STREET AREA

"Located half a mile from the central business district, the Birmingham Street section will offer spacious home sites on quiet residential streets, newly paved and serviced with utilities (Exh. A, p. 14).

"NORTH FIFTH STREET AREA

"Like the Birmingham Street Area, this area is only a short distance from the central business district of the city. And it is equally well served with city utilities and community facilities, elementary and high schools for Negro children being less than half a mile away. The North Fifth Street Area is, in fact, virtually the only

"The general procedures developed in the course of actual operating experience from the joint efforts of

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such close-in land available for expansion of the Negro community (Exh. A, p. 15).

"Provision is made at the north extreme of the area for continuing North Fifth Street beyond this site so that the Negro neighborhood can be expanded by private developers (Exh. A, p. 15).

"SURVEY AREAS

"Birmingham Street Survey Area

"The core of this area is a group of squalid dwellings occupied by Negro families, some of whose grandparents undoubtedly also occupied this same old servants' quarters section. There are no schools, parks, or social facilities, but the residents have built several churches which fill an important social need as well as the religious one (Exh. A, p. 18).

"COMMUNITY FACILITIES

"Birmingham Street Survey Area

"Of the five churches, two serve the Negro neighborhood at Birmingham Street, the others having city-wide white congregations (Exh. A, p. 22).

"RACIAL OCCUPANCY

"While occupancy of dwelling units in the Birmingham Street Survey Area is evenly divided (323 white and 331 Negro), it is the sections of Negro occupancy—Birmingham-Bay Streets and St. John's Alley—that coincide with the sections of blighted housing (Exh. A, p. 24).

"In the North Fifth Street Survey Area Negro families occupy about 40% of the dwellings, but the fact that so little of the area is built up leaves its future racial status still in doubt. North of Tuscaloosa Avenue only specific planning, such as is advocated in this redevelopment proposal, can forecast the future racial occupancy" (Exh. A, p. 24).

That document also contained a colored map with "Source: City Directory, 1952" showing "Racial Occupancy and Home Ownership" and the other maps showing the projected plans for the North 5th Street area, including a "Proposed Colored Auditorium" and "Playfield (Col.)" (Exh. A, p. 25).

the local and Federal agencies to assure that the living space available in a community to Negro and other racial minority families is not decreased are based upon the following:

"A slum or blighted area presently occupied in whole or in part by a substantial number of Negro or other racial minority families may be cleared and redeveloped if:

"1. The area is to be redeveloped as a residential area and the housing is to be available for occupancy by all racial groups (at rents or sales prices within the financial capacity of a substantial number of Negro or other racial minority families in the community), or

"2. The area is to be redeveloped as a residential area and a proportion of the housing bearing reasonable relationship to the number of dwelling units in the area which were occupied by Negro or other racial minority families prior to its redevelopment is to be available for occupancy by Negro or other racial minority families, or

"3. The area is to be redeveloped as a residential area but the housing is not to be available for occupancy by all racial groups or for occupancy by Negro or other racial minority families, and:

"A. Decent, safe, and sanitary housing available for occupancy by Negro, or by other minority group families (in an amount substantially equal to the number of dwelling units in such area which were occupied by Negro or other racial minority families prior to its redevelopment) is made available (at rents or sales prices within the financial capacity of a substantial number of Negro or other racial minority families in the community) through new con-

struction in areas elsewhere in the community or in adequate existing housing in areas elsewhere in the community not theretofore available for occupancy by Negro or by other racial minority families, which areas are not generally less desirable than the area to be redeveloped, and

"B. Representative local leadership among Negro or other racial minority groups in the community has indicated that there is no substantial objection thereto, or . . . " (Plaintiffs' Exh. B, pp. 2-3).

Referring to that letter, Mr. Wedge testified that: "Paragraph 3 of L.P.A. 16 has (n)ever been used or applied by the Housing and Home Finance Agency to promote any form of housing restricted to occupancy by members of the colored race" (R. 268).

Mr. Wedge further testified:

"Since L.P.A. Letter No. 16 contains administrative guides for reviewing one of the many aspects of an urban renewal project, the Birmingham Street Project was reviewed in the light of so-called procedure No. 3 as well as many, many other procedures and requirements of the agency" (R. 205).

After some understandable hesitation, both Mr. Wedge and Mr. Mills were commendably frank and candid to the effect that the plans contemplated actual segregation of the races.

Mr. Wedge testified:

"Q. Then I will ask you the same question with reference to the Birmingham Street area. It is contemplated that the Birmingham Street area when redeveloped will be available for any non-white occupancy? (R. 225.)

"A. The relocation plan, as I mentioned, is the place where we have to look carefully under the provisions of 105 (c) to determine the financial ability of displaced families and, therefore, North Fifth Street is a factor in the feasibility of relocation strictly from an economic point of view. With respect to the Birmingham Street, the plans in compliance with the federal law conform to the plan for the community as a whole and of the neighborhood in particular, and in that case on the basis of marketability studies and indications of probable types of development, it appeared that the land there would be substantially more costly than the land that would be provided in the North Fifth Street area. Does that answer your question? (R. 225-226.)

"Q. Well, yes, sir, I think it does substantially answer it except for one minor point that I would like to get completely clear. The fact is, then, that whether it is because of economics or for whatever other reason, the Urban Renewal Administration does not contemplate that the Birmingham Street area will be available for non-white occupancy? (R. 226.)

"A. We do not contemplate that" (R. 226).

Mr. Mills testified:

"Q. I will ask you if it is not a matter of policy, custom and usage for all housing projects in the City of Gadsden to be racially segregated?

"A. The projects occupied by white people are built in white areas. And the ones occupied by colored people are in the colored areas.

All applications are received in one central office, and they are all processed by the same person, and the housing, as it becomes vacant is made available to them" (R. 61).

As to low rent public housing to be administered directly by the Authority, Mr. Mills testified:

"Q. You don't plan any new construction of low rent public housing?

"A. Oh yes.

"Q. Have you set any date?

"A. Some future time.

"Q. Even any date within years?

"A. Do you want me to answer your question?

"Q. Has any date been set within even a period of three or four years?

"A. No, there has been no date set, but a reservation of two hundred units has been made.

"Q. Will they be for white or colored?

"A. It is dependent on the need.

"Q. In any event, will they be segregated or desegregated?

"A. They will follow the community pattern of Gadsden, which is segregated public housing.

"Q. We come back to the same thing, if any of these plaintiffs are eligible and do, either by choice or necessity, move into a low rent housing project, it will be a segregated low rent housing project?

"A. Oh yes.

"Q. If it is in Gadsden.

"A. That is right" (R. 154).

Mr. Mills insisted, however, that there was no requirement of racial segregation:

"A. Of course, Mr. Burns, all the way through, in both the preliminary and the other plan there has been this anti-restrictive clause, anti-racial clause in it. And we haven't said that Negroes shall live or shall not live in

either one of these areas in the redevelopment plan as adopted" (R. 170).

In the formally approved redevelopment plan of the Birmingham Street Area, it is provided under the heading of "Controls on Redevelopment":

"a. Redeveloper's Contracts—In addition to such conditions and requirements as the Authority may deem desirable, each contract and deed with a redeveloper shall also require: (Plaintiffs' Exh. 1, p. 9 of said Plan.)

. . . . . .

"b. Covenants Running with the Land—Notwithstanding the provisions of any zoning or building ordinances or regulations, now or hereinafter in force, the following shall be incorporated as covenants inappropriate disposition instruments by reference to a written declaration thereof recorded simultaneously with the new plat of the Project Area. These covenants are to run with the land and shall be binding on all parties and persons claiming under them for the period of time this Redevelopment Plan is in effect, except that the Anti-Racial Covenant paragraph (2)(c) below shall run in perpetuity (Id. p. 10).

. . . . . .

"(2) General Covenants

. . . . . .

"(c) Anti-Racial Covenant—No covenants, agreement, lease, conveyance or other instrument shall be effected or executed by the Authority, or by the purchasers or lessees from it or any successors in interest of such purchasers or lessees, whereby land in the Project Area is restricted upon the basis of race, creed

or color, in the sale, lease or occupancy thereof" (Id. p. 10).

Section 106 of "Part II of Loan and Grant Contract between a Local Public Agency and the United States of America" provides in part:

> "(C) *General Requirements Concerning Land.*—The Local Public Agency will:
>
> "(1) Take all reasonable steps to remove or abrogate or to cause to be removed or abrogated, any and all legal enforceable provisions in any and all agreements, leases, conveyances or other instruments restricting, upon the basis of race, creed or color, the sale, lease or occupancy of any land in the Project Area which the Local Public Agency acquires as a part of the Project;
>
> "(2) Not itself effect or execute, and will adopt effective measures to assure that there is not effected or executed by the purchasers or lessees from it (or the successors in interest of such purchasers or lessees), any agreement, lease, conveyance or other instrument whereby Project Land which is disposed of by the Local Public Agency is restricted, either by the Local Public Agency or by such purchasers, lessees or successors in interest, upon the basis of race, creed or color, in the sale, lease or occupancy thereof; (Plaintiffs' Exh. 1, p. 9 of said Contract)
>
> . . . . . .
>
> "(H) *Obligating Redevelopers.*—When Project Land is sold or leased by the Local Public Agency, it will obligate the purchasers or lessees, as the case may be, (1) to devote such Project Land to the uses specified in the Project Redevelopment Plan; and

(2) to begin and complete the building of their improvements on such Project Land within a reasonable time" (Id. pp. 10-11).

I do not consider it necessary to extend this overlong statement of the facts by referring to another printed brochure captioned "The Gadsden Plan" and shown on its flyleaf to have been "Adopted by The City Planning Commission Of The City of Gadsden, Alabama—February 19, 1949" (Plaintiffs' Exhibit 1 attached to Wedge deposition). Mr. Wedge testified that the parts of that document upon which the plaintiffs rely were not considered by the Urban Renewal Administration, and Mr. Mills called attention that that document was obsolete:

"I would like for the record to show that is a publication of the City Planning Commission of the City of Gadsden, that the studies were completed in 1947, that it was adopted in January 1949, I think, prior to the passage of the Housing Act of 1949" (R. 254).

Further, it is not necessary to consider two items of evidence to the introduction of which the defendants objected; namely, a news release of the Housing and Home Finance Agency dated November 7, 1957, and an article from a Jackson, Mississippi, newspaper dated March 5, 1958, describing a meeting at which Mr. Mills described parts of the Gadsden redevelopment program (Plaintiffs' Exhibits C & E).

Judgment

Extract from the Minutes of June 30, 1959.

No. 17534

E. F. BARNES, J. C. CARSON, J. JELKS and J. ROBERTSON,

—v.—

THE CITY OF GADSDEN, ALABAMA, *et al.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, E. F. Barnes, J. C. Carson, J. Jelks and J. Robertson, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, concurring in part and dissenting in part."

Order Denying Rehearing

Extract from the Minutes of September 4, 1959.

No. 17534

E. F. Barnes, J. C. Carson, J. Jelks and J. Robertson,

—v.—

The City of Gadsden, Alabama, *et al.*

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissents."

APPENDIX B

Title 42, United States Code §1455

Local determinations.—Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; and (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole;

(b) When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this title, are necessary to carry out the purposes of this title [§1450 et seq. of this title]: Provided, That clause (ii) of this subsection shall not apply to mortgagees and others who acquire an interest in such property as the result of the enforcement of any lien or claim thereon;

(c) There be a feasible method for the temporary relocation of families displaced from the urban renewal area, and that there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and reasonably accessible to their places of employment.

(d) No land for any project to be assisted under this title [§§1450 to 1460 of this title] shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing. (July 15, 1949, c. 338, Title I, §105, 63 Stat. 416; Aug. 2, 1954, c. 649, Title III, §307, 68 Stat. 625; Aug. 7, 1956, c. 1029, Title III, §302(a)(1), 70 Stat. 1097.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 499.

E. F. BARNES, J. C. CARSON, J. JELKS
and J. ROBERTSON,
Petitioners,

v.

THE CITY OF GADSDEN, ALABAMA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 268 F. 2d 593 and of the United States District Court for the Northern District of Alabama at

174 F. Supp. 64 (1958). The judgment of the Court of Appeals was entered on June 30, 1959. A timely petition for rehearing was denied on September 4, 1959. The petition for a writ of certiorari was filed on October 27, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether petitioners are entitled to an injunction and declaration of rights against the execution and putting into effect of certain urban redevelopment plans of the City of Gadsden, Alabama, on the ground that they foster enforced racial segregation, where both courts below found that no evidence had been presented that the redevelopment plans propose or contemplate racial discrimination.

STATEMENT OF THE CASE.

Petitioners (Negro citizens) sought a declaration of rights and injunction to restrain the City of Gadsden and its Housing Authority from proceeding with slum clearance and urban redevelopment plans on the ground that the two projects involved were designed to perpetuate a pattern of segregated communities and housing in the City of Gadsden. Petitioners alleged that the program would discriminate against Negroes. More specifically, it was alleged that (1) the purpose of the redevelopment plans is to eliminate a racially-mixed neighborhood and establish separate all-Negro and all-white neighborhoods and (2) the redevelopment plans are discriminatory and in violation of the due process and equal protection provision of the Fourteenth Amendment to the Federal Constitution and other rights secured to the petitioners under the provisions of Title 42, United States Code, Sections 1981 and 1982. The United States District Court held that the threat of immediate and irreparable damage had not been shown and denied the application for preliminary injunction. After hearing on the merits on the request for declaratory judgment and a permanent injunction, the District Court, on August 19, 1958, refused to grant the relief sought and entered judgment for the respondents. The District Court in its findings of fact, found that:

> "The City * * * has adopted no ordinance or resolution based upon a policy, custom and usages of initiating, encouraging, enforcing and perpetuating residential segregation of the Negro and white races within its corporate limits. The City has neither by resolution, ordinance, nor other official action adopted any plans intended to or that will have the effect of rezoning the Negro or white residential areas within its limits and restricting the areas which will be available to the plaintiffs and members of their class for

future residential purposes, nor has the City adopted any resolution, ordinance or zoning regulation restricting any area so as to make the same unavailable to the plaintiffs and members of their class for residential purposes. The only zoning ordinance of the City applicable to residences applies to all persons and is based on types of dwellings and not on types of occupants or ownership" (Record p. 279).

Further the Court found that:

"No evidence has been presented that the [Housing] Authority, or the City, has included in the plan for the redevelopment of the Birmingham Street Area that sales by private purchasers or private redevelopers will be restricted to white people only or that the plaintiffs and members of their class will not be permitted to purchase same solely because of race or color. There is no evidence that by any plan for redevelopment and sale only plaintiffs or members of their class will be permitted to own or occupy the lots in the North Fifth Street Area. The evidence likewise fails to reveal that the [Housing] Authority has any plan for sales of dwellings in the involved areas after redevelopment in contravention of the Anti-Racial Covenant * * *. As to each such contention, the evidence and its tendencies are to the contrary" (Record p. 280).

The Court concluded, inter alia, that the Housing "Authority is prohibited from imposing racially-discriminatory restrictions upon resale" of project land. The Court refused, as an alternative, to require the Housing Authority to grant prior rights of purchase in favor of former residents of the project area, stating that the law does not compel integration but only prohibits enforced segregation, citing **Cohen v. Public Housing Administration**, 257 F. 2d 73 (1958), **cert. denied** 358 U. S. 928 (1959). The Court

cited and relied upon the principle that the law presumes that public officials will properly discharge their duties and that the courts will not anticipate evasion or improper performance of such duties.

The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit in a brief opinion filed on June 30, 1959. Judge Rives wrote a separate opinion concurring in the affirmance of the judgment insofar as it denies an injunction but dissenting as to the declared rights of the parties. The dissenting judge expressed the view that (1) actual segregation is contemplated under the proposed urban redevelopment plans, (2) the contemplated actual segregation is to be governmentally enforced, and (3) a redeveloper may not legally discriminate between purchasers on the basis of race or color.

ARGUMENT.

I. Supreme Court's Reluctance to Grant Certiorari to Review Evidence and Specific Facts.

The petitioners seek a review in this Court of the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court based upon findings of fact and conclusions of law in favor of respondents on all issues. Where the decision of the Court of Appeals sought to be reviewed turns entirely upon an analysis of the particular facts involved, or upon construction of particular contracts or written instruments, a petition for certiorari ordinarily is denied as lacking "substantial grounds". The Court will usually not grant certiorari to review evidence and discuss specific facts. **Graver Manufacturing Co. v. Linde Co.**, 336 U. S. 271, 275 (1949), and cases cited therein; **General Talking Pictures Corporation v. Western Electric Co.**, 304 U. S. 175 (1938); **N. L. R. B. v. Waterman S. S. Co.**, 309 U. S. 206, 208 (1940), and **Southern Power Co. v. North Carolina Public Service Co.**, 263 U. S. 508 (1924).

II. Application of Two-Court Rule.

Findings of fact concurred in by two lower courts will be accepted by the United States Supreme Court unless exceptional error is shown. **Comstock v. Group of Investors**, 335 U. S. 211, 214 (1948); **Corn Products Co. v. Commissioner**, 350 U. S. 46, 51 (1955). This well-settled "two-court rule" operates as well upon consideration of petitions for certiorari. Here both courts below decided against petitioners on the question as to whether the two urban redevelopment plans required or contemplated racial segregation.

III. Action is Premature.

There is no real controversy. The petitioners' position is based solely on speculation that respondents some time in the future might not follow their obligations under the law. Petitioners merely prophesy they may be discriminated against although there is an absence of proof of threatened discrimination. They nevertheless seek to enjoin the carrying out of the urban redevelopment plans involved despite the serious injury the public may suffer from the stoppage of the slum clearance projects. The record must present a case or controversy appropriate for adjudication. **Longshoreman's Union v. Boyd,** 347 U. S. 222, 224 (1954); **Aetna Life Insurance v. Haworth,** 300 U. S. 227 (1937); **Florida Lime & Avocado Growers v. Jacobsen,** 169 F. Supp. 774 (N. D. Calif., 1958). Equity will not act merely because of apprehension and fear when irreparable injury will not occur except possibly and then in the remote future. **Donnelly Garment Co. v. Dubinsky,** 55 F. Supp. 587, 596 (W. D. Mo. 1944), **aff'd.** 154 F. 2d 38 (C. A. 8, 1946); **Worthington Pump Corp. v. Douds,** 97 F. Supp. 656, 661 (S. D. N. Y. 1951); Skelly v. Dockweiler, 75 F. Supp. 11 (S. D. Calif. 1947). Plainly these petitioners are seeking only an advisory opinion. This Court will not decide abstract, hypothetical or contingent questions; nor constitutional issues in advance of the necessity thereof or give advisory opinions. **Alabama State Federation of Labor et al., v. McAdory et al.,** 325 U. S. 450, 461 (1945). Moreover, equity will not restrain one from doing what he is not attempting and does not intend to do. **N. L. R. B. v. Express Publishing Co.,** 312 U. S. 426 (1941); **Blease et al. v. Safety Transit Co.,** 50 F. 2d 852, 856 (1931). Here there is no evidence that respondents are attempting to discriminate or threatening to discriminate against petitioners.

The District Court noted the distinction between private and State action with respect to the application of the con-

stitutional guarantee of equal protection of the law. The Court observed that if it were **assumed** that private redevelopers should restrict sales and occupancy along racial lines in the future such would not be "State action" in violation of constitutional restraints.

Since the findings of fact clearly establish that racial discrimination has not been committed or threatened the trial court's observation was not requisite to the disposition of the issues. The District Court noted that each of the two urban redevelopment plans involved in this case contains an anti-racial covenant specifying that none of the agreements or conveyances executed under the plan shall impose any racial restrictions. Nor did the Court find anything in the plans to require that the sales by private redevelopers will be restricted to white people only or that the Negroes will not be permitted to purchase property solely because of race or color.

CONCLUSION.

The decision below turns upon its own facts and there is no conflict of decision among lower courts which justify grant of certiorari. Furthermore, there is no important question of Federal law involved in the case so as to warrant review in this Court.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

W. B. Dortch

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Attorneys for Respondents.

Certificate of Service.

This is to certify that on the 17th day of November, 1959, I served a copy of the foregoing brief for the respondents in opposition to writ of certiorari upon Arthur Burns, Esq., attorney for petitioners, by personally serving a copy upon him at his office in the City of Gadsden, Alabama.

.....
Attorney for Respondents.